Supreme Court, U.S.
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No. 97-921

In The

Supreme Court of the United States

October Term, 1997

EDNA T. THOMPSON,

Petitioner,

vs.

CRAWFORD W. LONG, M.D.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL A. PANNIER
Counsel of Record
KARL M. BRAUN
SULLIVAN HALL BOOTH & SMITH, P.C.
Attorneys for Respondent
1360 Peachtree Street, N.E.
One Midtown Plaza, Suite 800
Atlanta, Georgia 30309
(404) 870-8000

144336

(800) 274-3321 • (800) 359-6859
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Petitioner argues that the Georgia five year statute of repose provided for medical malpractice actions under O.C.G.A. § 9-3-71(b) violates her rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioner contends that the Court should apply an intermediate level of scrutiny in evaluating the constitutionality of Georgia's statute of repose. Alternatively, Petitioner argues that the statute of repose violates her equal protection rights under a "rational basis" analysis. As shown more fully below, the Georgia Supreme Court has previously upheld the constitutionality of the medical malpractice statute of repose on equal protection grounds in a manner consistent with opinions of the United States Supreme Court. Consequently, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

Under Georgia law, an action for medical malpractice must be brought within two years of the injury or death resulting from the alleged malpractice, but in no event may an action be brought more than five years after the alleged negligent act or omission. O.C.G.A. § 9-3-71. This code section creates a two year statute of limitation and a five year statute of ultimate repose.

In *Craven v. Lowndes County Hosp. Auth.*, 263 Ga. 657, 437 S.E. 2d 308 (1993), the Georgia Supreme Court upheld the medical malpractice five year statute of repose under an equal protection challenge. Because the Plaintiff was not a member of a suspect class, the Court applied the "rational basis test." The Georgia Supreme Court upheld the constitutionality of the five year statute of repose, since it was rationally related to a legitimate government purpose not prohibited by the Constitution. The court found that the medical malpractice statute of limitation and statute of repose serve the purpose of eliminating stale claims. Also,

> [b]ecause of the nature of the practice of medicine, uncertainty over the causes of illness and injury make

> it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause.

Id. at 659. Therefore, the Georgia Supreme Court held the statute of repose to be reasonably related to a legitimate government purpose. *See also Waters v. Rosenbloom*, 268 Ga. 482 (1997).

The level of scrutiny applied by the Georgia Supreme Court in *Craven, supra*, is consistent with decisions of this Honorable Court in other cases evaluating equal protection challenges to state law under the Fourteenth Amendment. As a starting point, federal courts should presume that state legislatures have acted constitutionally in making laws. *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404 (1969). Then, in evaluating state laws under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, it is necessary to apply different levels of scrutiny depending on the nature of the classification. "At a minimum, a statutory classification must be rationally related to a legitimate government purpose." *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910 (1988), citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17(1973); *cf. Lyng v. Automobile Workers*, 485 U.S. 360, 370 (1988). Under the "rational basis" test, state statutes are presumed to be constitutional as long as the challenged classification is rationally related to some legitimate state interest, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, . . ." *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 97 S. Ct. 2513 (1975).

"Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most

exacting scrutiny." *Clark, supra* at 461, citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 672 (1966). Under the "strict scrutiny" standard, a statute must be necessarily or narrowly tailored to achieve a compelling or overwhelming government purpose. *Id.*

Finally, an intermediate level of scrutiny has been applied generally to statutory classifications based on sex or illegitimacy. *Clark, supra* at 461, citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-724, and n.9 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Matthews v. Lucas*, 427 U.S. 429, 505-506 (1976). Under the intermediate level of scrutiny, a classification must be "substantially related" to the achievement of "important government objectives." *Craig, supra*, at 197.

Petitioner relies heavily on *Carson v. Maurer*, 120 N.H. 925, 424 A. 2d 825 (1980) to argue that the intermediate level of scrutiny should be applied in this case. Petitioner's reliance on *Carson* is misplaced, however, since *Carson* analyzes the constitutionality of a New Hampshire statute under the equal protection provision of the New Hampshire Constitution. The New Hampshire statute was not challenged under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as is the statute of repose in the present case. The *Carson* court recognized that, under Fourteenth Amendment analysis, the intermediate level of scrutiny has been restricted to classifications based on gender and illegitimacy. The *Carson* court held, "in interpreting *our state constitution*, however, we are not confined to federal constitutional standards and are free to grant individuals more rights than the Federal Constitution requires." (emphasis added). *Id.* at 932. Therefore, *Carson* is inapplicable to Petitioner's challenge of the Georgia statute of repose under the equal protection guarantees of the Fourteenth Amendment to the United States Constitution, since the *Carson* court was applying the additional rights granted to New Hampshire citizens under the New Hampshire Constitution.

Petitioner also cites several Georgia Supreme Court opinions, in which she argues that the Georgia Supreme Court applied an intermediate level of scrutiny in analyzing various Georgia statutes. Again, Petitioner's reliance on these cases is misplaced. In each of the cases cited, the Georgia Supreme Court specifically stated that it was applying the rational basis test. *Ponder v. Fulton-Dekalb Hosp. Auth.*, 256 Ga. 833, 835, 353 S.E. 2d 515, 516 (1987); *Smith v. Cobb Co.-Kennestone Hosp. Auth.*, 262 Ga. 566, 569, 423 S.E. 2d 235, 238 (1992); *Mansfield v. Pannell*, 261 Ga. 243, 244, 404 S.E. 2d 104, 105 (1991); *Clark v. Singer*, 250 Ga. 470, 472, 298 S.E. 2d 484 (1983); *Allrid v. Emory Univ.*, 249 Ga. 35, 38, 285 S.E. 2d 521, 524 (1982); and *Bickford v. Nolan*, 240 Ga. 255, 256, 240 S.E. 2d 24, 26 (1977). Since none of the statutes analyzed in the previously cited cases involved suspect classifications nor fundamental rights, the Georgia Supreme Court upheld the statutes at issue in each case under the rational basis analysis.

Woodward v. Burnham City Hospital, 449 U.S. 807, 101 S. Ct. 54 (1980), dismissing appeal from *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979) is directly on point with the present case and provides an excellent historical analysis of the development of medical malpractice statutes of repose. In *Anderson*, the Supreme Court of Illinois upheld the Illinois two year medical malpractice statute of limitation and four year medical malpractice statute of repose under the equal protection clauses of both state and federal constitutions. The *Anderson* court provided a detailed analysis of the legitimate governmental purposes served by the medical malpractice statute of repose by applying the rational basis test. Moreover, the *Anderson* court cited a number of opinions from courts around the country upholding similar statutes against charges that a statute of repose violates equal protection. *Anderson*, *supra*, at 310. The United States Supreme Court dismissed the appeal in *Anderson* for want of a substantial federal question. *Woodward, supra*, at 807. A dismissal of an appeal for want of

substantial federal question is a decision on the merits of the case. *Ohio ex rel Eaton v. Price*, 360 U.S. 246, 79 S. Ct. 978 (1959); *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S. Ct. 2281 (1975). *See also Pullum v. Cincinnati, Inc.*, 475 U.S. 1114, 106 S. Ct. 1626 (1986), dismissing appeal from *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (1985). (Florida twelve year statute of repose in products liability cases upheld under rational basis test.); *Elerbee v. Otis Elevator Co.*, 459 U.S. 802, 103 S. Ct. 24 (1982), dismissing appeal from *Elerbee v. Otis Elevator Co.*, 618 S.W. 2d 870 (1981). (Texas ten year statute of repose in real property cases upheld under rational basis test).

As previously shown, the Court should not apply an intermediate level of scrutiny in analyzing the constitutionality of the Georgia medical malpractice statute of repose. Petitioner argues alternatively that the statute violates her equal protection rights guaranteed by the Fourteenth Amendment under the rational basis test. Petitioner asserts that the goal of eliminating stale claims is accomplished by the statute of limitation and that other types of personal injury claims are not subject to similar statutes of repose. Contrary to Petitioner's position, see *Woodward v. Burnham City Hosp.*, 79 Ill. 2d 295, 402 N.E. 2d 560 (1979), for a detailed discussion of the unique "long tail" problem found in medical malpractice cases and the legitimate role statutes of repose play in addressing the problem. Additionally, the Petitioner admits that legitimate government purposes are served by the statute of repose, such as "limiting the time frame in which an individual may bring an action," " 'wiping the slate clean' at a certain point in time," and allowing "insurance companies to accurately access premiums." Page 12, Petition for Writ of Certiorari. Petitioner simply questions the legislative method of attaining these goals.

Petitioner's arguments against the statute of repose exceed the permissible scope of equal protection analysis under the rational basis test.

> [A] state does not violate the Equal Protection Clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequity." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations-illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 . . . [The rational-basis standard] is true to the principal that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

City of Dallas v. Stanglin, 490 U.S. 19, 26-27, 109 S. Ct. 1590 (1989).

CONCLUSION

The Georgia medical malpractice five year statute of repose under O.C.G.A. § 9-3-71 is rationally related to a legitimate government purpose, and as such, it satisfies the Petitioner's rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL A. PANNIER
Counsel of Record
KARL M. BRAUN
SULLIVAN HALL BOOTH
& SMITH, P.C.
Attorneys for Respondent
1360 Peachtree Street, N.E.
One Midtown Plaza, Suite 800
Atlanta, Georgia 30309
(404) 870-8000